



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 38

RIN 2900-AO99

Reimbursement for Caskets and Urns for Burial of Unclaimed Remains in a National Cemetery

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) National Cemetery Administration (NCA) amends its regulations to establish a new program to provide reimbursement for caskets and urns for the interment of the remains of veterans with no known next-of-kin and where sufficient financial resources are not available for this purpose.

DATES: Effective date: The final rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER]. Applicability date: The final rule applies to claims for reimbursement for burial receptacles for individuals who died on or after January 10, 2014.

FOR FURTHER INFORMATION CONTACT: Andrina Brown, Office of Field Programs (41A), National Cemetery Administration (NCA), Department of Veterans Affairs, 810

Vermont Avenue, NW., Washington, DC 20420. Telephone: (202) 461-6833 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: In a document published on July 2, 2014 (79 FR 37698), VA proposed revising its regulations governing burial in national cemeteries to implement new authority under section 2306 of title 38, United States Code (U.S.C.), to furnish a casket or urn for interment in a VA national cemetery of the unclaimed remains of veterans for whom VA cannot identify a next-of-kin and determines that sufficient financial resources for the furnishing of a casket or urn for burial are not otherwise available. The 30-day public comment period ended on August 1, 2014. VA received fourteen comments from interested individuals and organizations. To address some of those comments, as will be explained in detail below, VA added a new paragraph (b) and redesignated proposed paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e), respectively.

Eight commenters expressed support for the proposed amendment. We thank these individuals for taking the time to review and comment on the rulemaking. We make no changes to the regulation based on these comments.

One commenter suggested that VA contract with online providers of caskets and urns to make bulk purchases of caskets and urns, which would then be shipped to individuals who apply online. As discussed in the preamble to the proposed rulemaking, VA considered the direct purchase option but determined that would be a less efficient and economical means of administering this benefit. Development of an online application portal and establishment of contractual relationships with suppliers would

require considerable time and would delay VA's ability to timely provide this benefit as needs arise. The expense required to contract and to build an online portal would decrease the resources available to provide the benefit itself. The commenter stated that he felt the suggestion would allow for "quality control." As we indicated in the preamble to the proposed rulemaking, unclaimed veteran remains are often in the custody of funeral homes or others who are authorized under state law to dispose of unclaimed remains. 79 FR at 37699. Therefore, we believe they are likely familiar with procuring burial receptacles. We further expect that those who will provide caskets or urns will use the same suppliers from whom they purchase caskets and urns for the families they serve in their normal course of business and that the caskets and urns they purchase will be of no lesser quality than those provided for family-requested funeral services. Further, as we provide in redesignated § 38.628(c)(5), VA will visually inspect the casket or urn when it is presented at the national cemetery to ensure that it corresponds to the description in the invoice and meets NCA's specifications, which are intended to ensure safe handling and integrity of veteran remains. Accordingly, VA makes no changes based on this comment.

Another commenter urged that we implement this benefit so that it is "not cumbersome to administer and is fair in the time it takes to reimburse." We believe that the reimbursement program we have outlined in our regulation meets both of those criteria. The commenter further suggested that VA develop a form and process for eligible veterans to "pre-order [and] get pre-authorized" to assist them with advance planning. Generally, VA encourages veterans and their families to plan for their burial needs. However, while such a plan may include a stated desire to be buried in a

national cemetery, VA has no authority to pre-determine eligibility for burial or memorialization, because eligibility decisions must be made based on the law in effect at the time the individual dies. If, upon the death of an eligible veteran, VA is made aware of the veteran's wishes regarding burial, VA will try to accommodate those wishes to the fullest extent possible. This regulation, however, is applicable when a veteran dies without sufficient funds available for burial and has no known next-of-kin. Third parties, such as public administrators, local coroners, funeral directors or volunteer organizations, who may have assumed responsibility for the burial of these unclaimed remains, will likely be unaware of any wishes for burial arrangements. However, even without knowing the burial wishes of the deceased veteran, by establishing a means to reimburse these third parties for the expense of a burial receptacle at a time of need, VA will ensure that these veterans receive an appropriate burial in a national cemetery. VA will make no changes based on this comment.

VA received comments from a funeral services trade association on two issues. The first issue concerned our reference to the Federal Trade Commission (FTC) regulations that define "alternative container" which VA construed as applicable to cremation urns. The commenter stated that "alternative container," in the funeral industry, "is the receptacle that the body is placed into prior to cremation." The commenter also stated that plastic is "generally not deemed appropriate for use as an urn." The commenter then suggested that we revise our regulation to include wood or metal, in addition to durable plastic, as an acceptable material for urns subject to reimbursement under § 38.628. We reviewed the FTC regulation in light of this feedback and believe that the commenter's statement that an alternative container

refers to a receptacle for the body prior to cremation is an accurate interpretation of the FTC regulation, which states that requiring the public to purchase a casket for direct cremations is an unfair or deceptive act or practice for a funeral provider and requires funeral providers to “make an alternative container available for direct cremations.” See 16 CFR 453.4(a)(2). We wish to correct the statement made in the preamble to the proposed rule (see 79 FR at 37699). However, we did not “base” the definition of “urn” in § 38.628 on the phrase “alternative container” (we did use the definition of “casket” from the FTC regulation) nor was “alternative container” used elsewhere in the proposed rulemaking. Our definition of urn was developed using the elements we felt necessary for a burial receptacle that would ensure that the cremated remains of veterans, in the absence of a family member to make such determinations, are laid to rest in a consistently dignified manner. We have decided that, for purposes of reimbursement, an urn made of durable plastic would be the minimum requirement because we must ensure that we use the finite resources at our disposal to provide this benefit for as many veterans, without family or resources, as we can. We disagree with the commenter’s assertion that durable plastic is “generally not deemed appropriate for use as an urn.” In fact, many of the inurnments at national cemeteries are of urns constructed of durable plastic, so while the commenter is correct that many families may choose to place the remains in urns of different construction, we can confirm that many find a durable plastic urn to be appropriate for the remains of their loved one.

Regarding the commenter’s request that we amend the regulation to include other materials for urn construction, although we stated in the preamble to the proposed rulemaking that we do not prohibit individuals or entities from purchasing burial

receptacles of higher standard, such as a stronger gauge metal for caskets, or wood or metal for urns, this comment indicates that our information was not sufficiently clear as to the types of caskets and urns that would be acceptable for reimbursement, and therefore we are making changes to the regulation to address the issue the commenter raises, although we will not be using the amendment suggested in the comment.

Proposed § 38.628(b)(5), now redesignated § 38.628(c)(5), was intended to prescribe certain minimum standards for caskets and urns that would ensure that each veteran, in the absence of a family member to make burial decisions, is laid to rest in a consistently dignified manner. We are making changes to redesignated paragraph (c)(5)(ii) to specifically address the commenter's concern by stating that individuals or entities may purchase and request reimbursement for urns constructed of materials other than durable plastic, including wood, metal, or ceramic, even though reimbursement will be limited to the average cost of a durable plastic urn. In reviewing this provision, we also noted that the casket provision may be subject to misinterpretation so we have amended redesignated paragraph (c)(5)(i) to clarify that the caskets must be of metal construction, but may be of a thicker gauge metal, even though reimbursement will be limited to the average cost of a casket of 20-gauge metal construction. We note that these changes will allow for only one material, metal, for the construction of caskets while urns may be constructed of a variety of materials. As stated in the proposed rulemaking, we established minimum standards to ensure the burial receptacles could withstand disinterment and reinterment, should that need arise. We explicitly require metal caskets because we believe they will endure the environmental conditions of in-ground burial better than other materials and keep the

remains intact. Urns may be inurned in above-ground niches, so their construction may not need to endure the rigors of in-ground burial. For those that will be inurned in the ground, we note that an urn will include an interior container for the cremated remains that will help ensure their integrity if the outer construction should fail.

While we have amended the language regarding the construction of a casket or an urn, we do not change the standard used to calculate the maximum reimbursement amount under redesignated paragraph (d). As stated in the proposed rule, we established a maximum reimbursement amount based on the minimum construction standards of either a casket or an urn. VA will reimburse for the actual cost of a burial receptacle, as shown on an invoice, up to a maximum reimbursement amount that is equal to the average cost of receptacles meeting the minimum standards for the fiscal year preceding the calendar year of when a claim for reimbursement is received. To ensure that the edits to redesignated paragraph (c) described above do not confuse how we calculate the average cost, we will state the minimum standards in redesignated paragraph (d), which establishes the maximum reimbursement amount. We reiterate here that VA will only reimburse for a single casket or urn purchased on behalf of any decedent and that, under redesignated § 38.628(c)(5), the cemetery director receiving the remains will visually inspect the casket or urn that is presented for burial or inurnment to ensure that it matches the description on the invoice submitted for payment. Therefore, if, as the commenter explained, the cremated remains are moved from one container to another of a different material, we will only reimburse for the cost of the urn presented for burial, subject to the maximum reimbursement amount. Any

individual or entity seeking reimbursement must ensure that the invoice presented for payment is the invoice for the burial receptacle presented for burial.

The same commenter noted a second issue regarding proposed paragraph (b)(2), now redesignated paragraph (c)(2), and the requirement that individuals seeking reimbursement certify that they cannot identify the decedent's next-of-kin and that VA's records do not identify the next-of-kin. The commenter objected that, because they do not have access to VA's records, they could not certify as to whether a next-of-kin was identified there. The commenter also added that funeral homes are often faced with a dilemma in which a deceased veteran's next-of-kin is identified but is unwilling or unable to assume responsibility for burial arrangements. The commenter suggested a clarification to reflect that an applicant who provides a casket or urn because of an uncooperative next-of-kin would still be entitled to reimbursement. We acknowledge the commenter's concerns are valid.

As an initial matter, we have determined that the required findings that a veteran have no known next-of-kin or sufficient resources to furnish a casket or urn can be satisfied by the applicant's certification to that effect. State and local laws governing the disposition of unclaimed remains require, generally, that a search be performed to identify a decedent's next-of-kin or authorized representative who may assume responsibility for the final disposition of the remains. VA believes that it would be reasonable to rely on the applicant's certification that no next-of-kin was identified as a result of an independent search performed in compliance with the legal requirements of that jurisdiction. The intent of the Dignified Burial and Other Veterans' Benefits Improvement Act of 2012 (the Act) is to assist individuals or entities in possession of

remains that are unclaimed in providing for the final disposition of those remains. Because we believe that an additional search by VA of its own records would be duplicative of this process and could potentially delay or even deter individuals or entities from bringing unclaimed veteran remains to VA for burial, we find that reliance on the applicant's certification that no next-of-kin has been identified is reasonable. Moreover, because laws related to the disposition of unclaimed remains also involve determinations of the decedent's indigency, VA will also accept the applicant's certification that, based upon available information, there are insufficient financial resources available to furnish a burial receptacle. Accordingly, we have added paragraph (b) to state that we will rely on the applicant's certification. Proposed paragraphs (b), (c), and (d) will now become paragraphs (c), (d), and (e), respectively, and we further amend redesignated paragraphs (c)(2) and (c)(3) to eliminate any requirement that an individual or entity seeking reimbursement must certify as to what is in VA records.

In redesignated paragraph (c)(2), we explicitly allow for the circumstance of the "uncooperative next-of-kin," as described by the commenter. As we stated in the preamble to the proposed rule, we cannot compel an identified next-of-kin of a deceased veteran who is unwilling or unable to assume responsibility for the deceased veteran's burial. We recognize that relevant state and local laws include provisions applicable to the type of situation described by the commenter. These laws often address the situation by allowing individuals or entities in possession of remains that are unclaimed to arrange for burial after a defined period of time, despite the existence of an uncooperative relative who may have means, but refuses to claim the decedent's

remains or arrange for final disposition. We therefore add a provision to redesignated paragraph (c)(2) to require the applicant to certify that they have followed the relevant state or local laws relating to the disposition of remains. VA will accept an applicant's certification that an identified next-of-kin is unwilling or unable to assume responsibility for the deceased veteran's burial arrangements as meeting the requirements that the decedent has no next-of-kin and insufficient resources to purchase the casket or urn.

We received a comment suggesting that we make provision for certain veterans who died prior to January 10, 2014. The effective date was defined in the authorizing statute and VA has no authority to provide caskets or urns for veterans who died prior to that date. The commenter also suggested, in his original comment and in a follow-up comment, that we make changes to regulatory provisions relating to our definition of applicant. That provision is beyond the scope of this rulemaking, but VA is planning to address it in another rulemaking soon. We make no changes to this regulation based on these comments.

One commenter questioned our estimate on the number of applications we anticipated we would receive under this regulation. We estimated that we would receive approximately 670 applications for reimbursement for a burial receptacle purchased in 2014 and that this number would decrease in years to come. The commenter appears to believe our estimate is too low, based on estimates of the total number of veterans who die yearly. Our estimate uses the total annual number of veteran deaths, but adjusts that number based on VA statistics to determine the number of veterans without a next-of-kin and where sufficient resources are unavailable to furnish a casket or urn,

to determine the number that may need to be furnished a burial receptacle under this regulation. We make no changes based on this comment.

In redesignated paragraph (d), we indicate that we will publish an annual notice providing the average cost of a casket or urn that will be the maximum allowable reimbursement amount for each type of burial receptacle. In the proposed rule, we indicated we would pay these rates based on the year the burial receptacle was purchased. However, we have determined that it will be more efficient to process applications using the maximum reimbursement amounts based on the year in which the application is received instead of the date the burial receptacle was purchased. We have changed paragraph (d) to indicate that these maximum rates apply to applications received for the purchase of a burial receptacle in a given calendar year and have deleted the reference to the date of purchase.

Finally, we are also updating redesignated paragraph (e) to indicate that we will reimburse those individuals who have been waiting for the publication of this final rule to submit their applications at the reimbursement rates for 2015. VA advised these individuals to hold their receipts until the publication of the final rule. Because publication has been delayed, and they could not submit those applications in calendar year 2014, the current maximum rates should apply. As indicated in the notice published elsewhere in this Federal Register, the maximum reimbursement amounts for 2015 are \$1,967 for a casket and \$172 for an urn, which apply to all applications received in calendar year 2015.

Based on the rationale set forth in the Supplementary Information to the proposed rule and in this final rule, VA is adopting the proposed rule as a final rule with

the changes as noted above to new paragraph (b) and redesignated paragraphs (c)(2), (c)(3), (c)(5), (d), and (e).

Effect of rulemaking

Title 38 of the Code of Federal Regulations, as revised by this final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible or, if not possible, such guidance is superseded by this rulemaking.

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612, because the number of claims and the amounts involved are expected to be small. This rule will only impact those third parties and entities that choose to participate in this program. Payments made under this program are not intended as benefits but to provide reimbursement for privately purchased caskets and urns. We estimate the average price of a burial receptacle (and therefore the average reimbursement) for 2014 will be less than \$2,000 for caskets and less than \$200 for urns. We also estimate that the total number of reimbursements for 2014 will be 338 caskets and 332 urns. Because the final rulemaking provides for a reimbursement, the individual or entity purchasing the burial receptacle will recoup the

purchase price, up to the maximum rate established annually. Generally this will result in the individual or entity avoiding a financial loss for having made the purchase. But, because the reimbursement will not exceed the purchase price of the burial receptacle, the individual or entity will not experience any gain. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. See also 5 CFR 1320.8(b)(3)(vi).

This final rule will impose the following new information collection requirement. Section 38.628 will require submission of new VA Form 40-10088 by individuals seeking reimbursement from VA for the purchase of a casket or urn for the remains of a veteran who has no next-of-kin and where sufficient resources are unavailable to furnish a burial receptacle. The collection of information is necessary for VA to obtain information sufficient to determine whether reimbursement is appropriate. Information provided will include proof that the requesting individual purchased the burial receptacle and that the burial receptacle meets standards detailed in the regulation, and the purchase price of the receptacle. VA will use this information to determine whether reimbursement is appropriate and, if so, the appropriate amount of the reimbursement.

As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA submitted this information collection to OMB for its review. OMB approved this new information collection requirement associated with the final rule and assigned OMB control number 2900-0799.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory

Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this rule have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866. VA’s impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA’s website at <http://www1.va.gov/orpm/>, by following the link for “VA Regulations Published.”

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program number and title for this rule are 64.201, National Cemeteries.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Chief of Staff, approved this document on April 7, 2015, for publication.

List of Subjects in 38 CFR Part 38

Administrative practice and procedure, Cemeteries, Veterans.

Dated April 8, 2015:

William F. Russo
Acting Director
Office of Regulation Policy & Management,
Office of the General Counsel,
U.S. Department of Veterans Affairs

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 38 as set forth below:

PART 38 – NATIONAL CEMETERIES OF THE DEPARTMENT OF VETERANS AFFAIRS

1. The authority citation for part 38 continues to read as follows:

Authority: 38 U.S.C. 107, 501, 512, 2306, 2402, 2403, 2404, 2408, 2411, 7105.

2. Add § 38.628 to read as follows:

§ 38.628. Reimbursement for caskets and urns for unclaimed remains of veterans.

(a) VA will reimburse any individual or entity for the actual cost of a casket or an urn, purchased by the individual or entity for the burial in a national cemetery of an eligible veteran who died on or after January 10, 2014, for whom VA:

- (1) Is unable to identify the veteran's next-of-kin; and
- (2) Determines that sufficient resources are otherwise unavailable to furnish the casket or urn.

(b) For purposes of satisfying the requirements of paragraph (a) of this section, VA will rely entirely on the requesting individual's or entity's certification as required under paragraphs (c)(2) and (3) of this section.

(c) An individual or entity may request reimbursement from VA under paragraph (a) of this section by completing and submitting VA Form 40-10088, and supporting documentation, in accordance with the instructions on the form. Prior to approving reimbursement VA must find all of the following:

(1) The veteran is eligible for burial in a VA national cemetery;

(2) The individual or entity has certified that they cannot identify the veteran's next-of-kin, or that an identified next-of-kin is unwilling or unable to assume responsibility for the deceased veteran's burial arrangements, and that the individual or entity has followed applicable state or local law relating to the disposition of unclaimed remains;

(3) The individual or entity has certified that, to the best of their knowledge, sufficient resources are otherwise unavailable to furnish the casket or urn;

(4) The invoice presented by the individual or entity clearly indicates the purchase price of the casket or urn purchased by the individual or entity; and

(5) The invoice presented by the individual or entity contains information sufficient for VA to determine, in conjunction with a visual inspection, that the casket or urn meets the following standards:

(i) Caskets must be of metal construction of at least 20-gauge thickness, designed for containing human remains, sufficient to contain the remains of the deceased veteran, include a gasketed seal, and include external fixed rails or swing arm handles.

(ii) Urns must be of a durable construction, such as durable plastic, wood, metal, or ceramic, designed to contain cremated human remains, and include a secure closure to contain the cremated remains.

(d) Reimbursement for a claim received in any calendar year under paragraph (a) of this section will not exceed the average cost of a 20-gauge metal casket or a

durable plastic urn during the fiscal year preceding the calendar year of the claim, as determined by VA and published annually in the Federal Register.

(e) If, before July 2, 2014, an individual or entity purchased a casket or urn for burial in a VA national cemetery of the remains of a veteran who died after January 10, 2014, and the burial receptacle is not at least a 20-gauge metal casket or a durable plastic urn, VA will reimburse the purchase price of the burial receptacle, providing all other criteria in this regulation are met. The reimbursement amount will be subject to the maximum reimbursement amount calculated for 2015.

(Authority: 38 U.S.C. 2306, 2402, 2411)

(The Office of Management and Budget has approved the information collection requirements under this section under control number 2900-0799.)

[FR Doc. 2015-08388 Filed: 4/10/2015 08:45 am; Publication Date: 4/13/2015]